IN THE

Supreme Court of the United States

October Term, 1947.

No. 530.

HAZEL E. BRIGGS,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Opinions Below.

The District Court filed a memorandum decision (R. 11), which is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 13) is reported 164 F. 2d 21. The opinion of the Circuit Court of Appeals for the Second Circuit on a prior appeal is reported 153 F. 2d 841.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on October 30, 1947 (R. 17). The petition for a writ of certiorari was filed on January 16, 1948, and granted on February 16, 1948 (R. 18). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347[a]).

Questions Presented.

1. Whether the Court below erred in holding that in an action under the Federal Employers' Liability Act the petitioner is not entitled to interest under the federal interest statute, R. S. 966 (28 U. S. C. A., 811), from the date of the verdict to the date of the judgment for the petitioner, the judgment of the District Court dismissing the complaint after a jury verdict for the petitioner having been reversed on a prior appeal.

2. Whether the Court below erred in holding that petitioner is not entitled, under Section 480 of the Civil Practice Act of the State of New York, to recover interest on the verdict from the date of the verdict to the date of the judgment in an action brought under the Federal Employers' Liability Act.

3. Whether the Court below erred in holding that the District Court was without jurisdiction to enter judgment for the petitioner except in conformity to the mandate of the Circuit Court.

STATUTES.

Section 966 of the Revised Statutes (28 U. S. C. A., Section 811), provides:

> "Interest on judgments. Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State."

Rule 58 of the Federal Rules of Civil Procedure provides:

> "Entry of Judgment. Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

Statement.

The petitioner instituted this action under the Federal Employers' Liability Act (28 U. S. C. A., Sections 51 to 60) to recover damages because of the death of her husband while employed by the respondent. During the trial, respondent moved to dismiss the complaint on the ground that the petitioner had no capacity to maintain the action. Decision on the motion was reserved.

Following a jury verdict in the amount of $42,500, the District Court granted respondent's motion to dismiss the complaint. The court set aside the verdict and judgment was entered dismissing the complaint (R. 2-3). On appeal, the judgment was reversed—*Briggs* v. *Pennsylvania R. Co.*, 153 F. 2d 841. The Circuit Court of Appeals held that the petitioner was entitled to maintain the action, and

its mandate, dated January 23, 1946, directed that judgment be entered for the plaintiff [petitioner] (R. 3-6). The mandate made no provision for interest. On January 28, 1946, judgment was entered for the petitioner (R. 6-7). The judgment provided that, in addition to the amount of the verdict, the petitioner recover interest for the period from February 15, 1945, the date of the verdict, to January 28, 1946, the date on which judgment was entered.

The respondent moved to resettle the judgment by striking out that portion of the judgment allowing interest between the date of the verdict and the date of entry of judgment (R. 7-8). Respondent's motion was denied by the District Court on March 5, 1946 (R. 10-11). On the same date a memorandum decision was filed by the District Court (R. 11).

The respondent appealed to the United States Circuit Court of Appeals for the Second Circuit from that part of the judgment which allowed interest from the date of the verdict to the date of entry of judgment for the petitioner (R. 11-12). On October 30, 1947, the Circuit Court of Appeals handed down its decision modifying the judgment of the District Court so as to exclude all interest upon the amount of the verdict up to the date judgment for the petitioner was entered, and the judgment, as so modified, was affirmed (R. 13-17).

The unanimous opinion of the Circuit Court of Appeals (R. 24-27), holding that petitioner was not entitled to interest until the judgment for petitioner was entered, is based on two principal grounds:

1. After pointing out that in an action under the Federal Employers' Liability Act the right to interest is determined by federal law, the opinion concluded that R. S. 966, the applicable federal interest statute, authorizes the allowance of interest only from the date on which

the judgment was actually entered. The opinion rejected the contention that under Rule 58 of the Federal Rules of Civil Procedure the date of the verdict should be held to be the date of the judgment for the petitioner. In reaching that result the court pointed out that no judgment for the petitioner was authorized to be entered on the verdict prior to the date of the mandate reversing the judgment of the trial court.

2. The opinion also held that the trial court was without jurisdiction to enter a judgment for the petitioner except in conformity to the mandate. Assuming *arguendo* the mandate to be in error as to the interest which should be allowed, the court concluded that, the term in which the mandate was entered having ended, there were no exceptional circumstances warranting recall and correction of the mandate.

ARGUMENT.

Summary.

1. The action having been brought under a federal statute, the Federal Employers' Liability Act, the substantive rights of the litigants, including the measure of damages, are governed by federal law. The decisions of the state and federal courts in New York are in agreement that federal law is controlling.

2. Under the applicable federal interest statute, R. S. 966, the petitioner is entitled to interest from the date judgment was actually entered in her favor, but not for any prior period. Within the meaning of Rule 58 of the Federal Rules of Civil Procedure, judgment could not have been entered for the petitioner before the mandate of the Circuit Court was handed down. Judgment for the petitioner was not entered until January 28, 1946, and, within

the plain language of Rule 58, it did not become effective before such entry. The cases cited by the petitioner do not establish her right to interest on the verdict within the equity of R. S. 966.

3. The mandate of the Circuit Court for the petitioner not having provided for interest, the District Court was bound by the mandate and without authority to enlarge it. Assuming that the mandate could have been recalled and corrected, the Circuit Court of Appeals properly held that, the term in which the mandate was entered having ended, there were present no exceptional circumstances warranting recall and correction of the mandate.

POINT I.

In an action under the Federal Employers' Liability Act the right to interest is governed by Federal Law and the New York Interest Statute is inapplicable.

This action is based solely on the Federal Employers' Liability Act. Questions of substantive liability must be determined according to the provisions of that Act and authoritative federal decision construing such provisions. It is well settled that the principles and rules of law arrived at by the federal courts will govern the substantive rights of the litigants. *Chesapeake & Ohio Ry Co.* v. *Kuhn,* 284 U. S. 44; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350. The right to interest on judgments is substantive. In *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485, 491, this Court said:

> "But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts."

Although the *Kelly* case involved interest as an item to be considered in calculating the present value of future lost earnings, the holding has been accepted by the courts as applying to interest on judgments under the Federal Employers' Liability Act. *Chicago, M., St. P. & P. R. Co.* v. *Busby*, 41 Fed. 2d 617 (C. C. A. 9); *Murphy* v. *Lehigh Valley R. Co.*, 158 Fed. 2nd 481 (C. C. A. 2). See also *Restatement Conflict of Laws*, §412 (a) and (*b*).

The petitioner argues that in the absence of federal law prohibiting interest between the rendition of a jury verdict and the entry of judgment, she was entitled, under the New York interest statute, to interest on the verdict (Civil Practice Act of the State of New York, §480). As authority the petitioner cites, at page 10 of her brief, *Mass. Ben. Assoc.* v. *Miles*, 137 U. S. 689 and *Klaxon* v. *Stentor Em. Co.*, 313 U. S. 487. Neither of these cases involved the enforcement of a right created by federal statute. In both cases, jurisdiction was based on diversity of citizenship, and no federal statute was involved. In the *Miles* case, *supra*, the action was one to recover a sum of money under a contract of insurance, and the right to interest, a substantive right, was determined by *lex loci*, as it would be today under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. The *Klaxon* case, *supra*, merely extended the holding of *Erie R. Co.* v. *Tompkins*, *supra*, to the field of conflict of laws. The petitioner also cites *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 Fed. 2d 847 (C. C. A. 6). An analysis of Judge Holmes' opinion discloses that the petitioner has misconstrued the decision as authority that the state interest statute is here applicable. It is true that Judge Holmes was of the opinion that the plaintiff should be awarded interest on the verdict under the Louisiana interest statute, but it is likewise true that a majority of the court was of a contrary opinion.

If this action had been brought in a state court in New York, the decision would not have been different. The

Court of Appeals, in *Murmann* v. *N. Y., N. H. & H. R. Co.*, 258 N. Y. 47, makes it plain that in New York the state courts will not invoke the state interest statute in actions under the Federal Employers' Liability Act, but will look to the federal law. In that case the Court of Appeals held that §132 of the Decedent Estate Law, which provides for interest in death cases, does not extend to actions brought under the Federal Employers' Liability Act. The court said (p. 450):

> "The federal legislation covers the whole field, and the power of the state is not broad enough to change the assessment of damages as determined by the verdict."

It is thus apparent that in New York there is uniformity between the forms of judgment in the state and federal courts in actions under the Federal Employers' Liability Act. Petitioner's argument that she is entitled to interest on the verdict pursuant to the New York interest statute is without merit.

POINT II.

The applicable federal interest statute does not allow interest for any period prior to date of the judgment.

The Federal Employers' Liability Act makes no provision for interest, and we must look to R. S. 966 (28 U. S. C. A. Sec. 811) for guidance. This statute provides that "Interest shall be allowed on all judgments in civil causes recovered in a District Court, * * * and it shall be calculated from the date of judgment, * * *." The language is plain and unambiguous. It cannot be construed to mean that interest shall be allowed before judgment has been entered. Since the statute prescribes that

interest shall be calculated from the date of the judgment, the determination of that date is decisive of the issue here presented.

It is undisputed that judgment for the plaintiff was not entered until January 28, 1946. The petitioner is entitled to interest for the period prior to January 28, 1946, only if the judgment can be construed to have been entered before the notation thereof was actually made in the civil docket. For such a construction the petitioner contends.

It is argued that but for the error committed by the trial judge in dismissing the complaint, the petitioner could and should have had judgment entered in her favor pursuant to Rule 58 of the Federal Rules of Civil Procedure. The petitioner overlooks the fact that Rule 58 does not contemplate the automatic and inexorable entry of judgment by the clerk after the verdict has been returned. As the court below held, following its decision in *Murphy* v. *Lehigh Valley R. Co.*, *supra*, until the trial court has disposed of all pending matters the clerk has no power to enter judgment upon a verdict. As long as there was pending a motion to set aside the verdict the clerk could not enter a final judgment for the petitioner. After the trial judge decided the pending motion and directed entry of the judgment he fairly determined to be correct, the clerk could not then enter judgment on the verdict for the petitioner—the court had directed otherwise. Under Rule 58 the clerk is instructed to enter judgment forthwith upon the verdict of the jury only if the court does not otherwise direct. The court ordered judgment to be entered for the respondent.

Rule 58 further provides that "* * * the notation of judgment in the civil docket as provided by Rule 79(a) constitutes the entry of judgment; *and the judgment is not effective before such entry.*" (Italics supplied.) No notation of judgment for the petitioner was or could have

been entered until after the Circuit Court of Appeals handed down its mandate of January 23, 1946. Within the plain language of Rule 58, the judgment for the petitioner did not become effective until the notation thereof had been entered in the civil docket. January 28, 1946, when judgment for the petitioner was actually entered, was the judgment day. As the court below said (R. 15):

> "The date of its entry became the judgment day from which interest is to be computed under the Statute. It was, under the circumstances, the first day when judgment could have been entered."

The petitioner further contends that it has been held to be within the equity of R. S. 966 to award interest from the date of the verdict where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment. In support of this contention, the petitioner relies upon *Louisiana and Arkansas Ry. Co.* v. *Pratt, supra,* and cites without discussion certain cases referred to in that opinion.(1)

> *Fowler* v. *Redfield* (C. C. N. Y. 1862) Fed. Cas. No. 5,003, 7 Fed. Cas. 995;
> *Dowell* v. *Griswold* (C. C. Or. 1877) Fed. Cas. No. 4,040, 9 Fed. Cas. 620;
> *Gibson* v. *Cincinnati Enquirer* (C. C. Ohio, 1877) Fed. Cas. No. 5,391; 10 Fed. Cas. 309;
> *Griffith* v. *Baltimore & O. R. Co.* (C. C. Ohio 1890) 44 F. 574, *aff'd on other grounds* (1895) 16 S. Ct. 105, 159 U. S. 603, 40 L. Ed. 274.

The petitioner apparently disregards the fact that these decisions were not concernd with the construction of R.

(1) See also *Nat. Bank, etc.* v. *Mechanics Nat. Bank,* 94 U. S. 437, cited in footnotes 9 and 10 of the opinion in the *Pratt* case.

S. 966 in suits arising under the Federal Employers' Liability Act or any other federal statute. Moreover, only in *Baltimore & O. R. Co.* v. *Griffith, supra,* was R. S. 966 even considered. It is true in that case, a common law action, that the District Court held the plaintiff was entitled to interest under R. S. 966. However, it is clear from the doctrine laid down by this Court in *Erie R. R.* v. *Tompkins, supra,* that in a suit brought in a federal court today under circumstances similar to those in the *Griffith* case, the substantive rights of the parties would be determined in accordance with the law of Ohio, and that in assessing damages, the Ohio interest statute would be followed, not R. S. 966. On appeal to the Supreme Court, the decision in the *Griffith* case was affirmed on other grounds, the Court pointing out that the question of interest was not before it.

In none of the other cases cited by the petitioner were the substantive rights of the litigants determined by federal statute. R. S. 966 had no application, and under such circumstances, it was proper to follow state interest statutes, according to the practice of the states. In those decisions there is no support whatever for the petitioner's contention that it has been held to be within the equity of R. S. 966 to award interest where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment.

The petitioner also cites *Leitch* v. *Chesapeake & O. Ry. Co.*, 125 S. E. 370, 97 W. Va. 498. In this case the Supreme Court of West Virginia reversed a lower court judgment for the plaintiff and remanded the action for a new trial. Any remarks the court may have made with respect to interest were dicta and irrelevant to the issues before it.

With respect to the *Pratt* case, it should be noted, as the court below pointed out (R. 14) that it does not clearly appear from the decision that the facts were the same as those in the instant case.

In *Mass. Ben. Assoc.* v. *Miles, supra,* this Court indicated that it would have rejected the construction of R. S. 966 for which the petitioner is contending.

> "Did the case rest solely upon this statute [R. S. 966], it is difficult to see how interest could be computed upon the verdict, inasmuch as a specific allowance of interest on judgments would seem to exclude the inference that interest should be allowed on verdicts before judgments."

It is submitted that the authorities relied upon by the petitioner and the cases referred to by the Circuit Court of Appeals for the Sixth Circuit in the *Pratt* case do not establish the petitioner's right to interest within the equity of R. S. 966.

POINT III.

The judgment of the Circuit Court made no provision for interest and the District Court was without authority to enlarge that judgment by adding interest thereto.

The mandate of the Circuit Court for the petitioner did not provide for interest. The mandate directed that judgment for the plaintiff be entered in the amount of the verdict; it made no direction as to interest. Under such circumstances, the District Court had no authority to enter any judgment other than one which conformed to the mandate of the Circuit Court. In *In re Washington and Georgetown R. Co.,* 140 U. S. 91, the trial judge added interest to a judgment which did not provide for interest and which had been affirmed by the general term of the court without any order as to interest. This Court held that the trial judge had no authority to add interest (p. 96):

> "The principle has been well established in numerous cases, that, on a mandate from this Court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate."

The District Court was bound by the mandate and could only enter a judgment in strict compliance with that mandate. As the Court below said (R. 15):

> "When our mandate specifically directs the entry of judgment for a designated amount, the District Court is without power to enter judgment for a different sum."

During the term in which the mandate was entered, the petitioner took no action to correct the mandate or to appeal from the decision of the court below with respect to the failure to allow interest. As the Circuit Court of Appeals said in *Thornton* v. *Carter*, 109 Fed. 2d 316 (C. C. A. 8) (p. 321):

> "The matter of interest up to the time that the first appeal was ended was, we think, a question which could have been, and therefore should have been, presented to this court, in connection with that appeal, and it is not a matter which can now be considered by the court below or by this court."

Even assuming that by a strained construction of R. S. 966 the Circuit Court could have recalled the mandate and directed entry of judgment for the plaintiff *nunc pro tunc* as of the day on which the original judgment for the defendant was entered, it properly held that it was too late to do that (R. 16):

"The term in which it [the mandate] went down passed without any application having been made for its recall and amendment. While we have the power in this, the succeeding, term to act to that end, *Hazel-Atlas Glass Co.* v. *Hartford Co.*, 322 U. S. 238, it is only in the most exceptional of circumstances, as where there has been a fraud upon the court, that it should be exercised. These circumstances are not present here. *Nachod* v. *Engineering and Research Corporation*, 2 Cir. 108 Fed. 2d 594; *Dobson* v. *U. S.*, 2 Cir. 31 F. 2nd 288 cert. denied 278 U. S. 653."

Blair v. *Durham*, 139 F. 2d 316 (C. C. A. 6) does not aid the petitioner. In the *Blair* case the Circuit Court of Appeals affirmed a judgment of the trial court in favor of the plaintiff. The Court held that, even though its mandate was silent as to interest, the plaintiff was entitled to interest from the date of the judgment, the judgment having been affirmed, upon the ground that the statutory right to interest under R. S. 966 automatically accrued to the plaintiff on the date of the judgment in the trial court. It should be pointed out that Rule 27 of the Circuit Court of Appeals for the Sixth Circuit provides that the mandate shall be taken to direct the allowance of interest in cases of affirmance of lower court judgments. In the *Blair* case the date of the judgment and the date of the verdict coincided; and that lower court judgment was later affirmed by the Circuit Court. It is not disputed that interest is to be computed from the date of judgment. In the *Blair* case, that date was the date of the verdict. It is otherwise here.

CONCLUSION.

The respondent submits that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 530.—October Term, 1947.

Hazel E. Briggs, as Administratrix of the Goods, Chattels and Credits which were of Ralph Briggs, Deceased, Petitioner,
v.
The Pennsylvania Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 24, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

This case first presents the question whether a plaintiff recovering under the Federal Employers' Liability Act, 45 U. S. C. § 51, is entitled to have interest on the verdict for the interval between its return and the entry of judgment, where the Circuit Court of Appeals' mandate which authorized the judgment contains no direction to add interest and is never amended to do so.

The jury returned a verdict of $42,500. The District Court then granted a motion, as to which decision had been reserved during the trial, to dismiss the complaint for lack of jurisdiction, and the judgment entered was therefore one of dismissal. However, the Circuit Court of Appeals reversed, 153 F. 2d 841, and directed that judgment be entered on the verdict for plaintiff. When the District Court entered judgment, it added to the verdict interest from the date thereof to the date of judgment. The mandate of the Circuit Court of Appeals had made no provision for interest. No motion to recall and amend the mandate had been made and the term at which it was handed down had expired. Motion to resettle so as to exclude the interest was denied by the District Court.

The Circuit Court of Appeals has modified the judgment to exclude the interest in question and to conform to its mandate, 164 F. 2d 21, and the case is here on certiorari, 333 U. S. —.

In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Himely* v. *Rose*, 5 Cranch 313; *The Santa Maria*, 10 Wheat. 431; *Boyce's Executors* v. *Grundy*, 9 Pet. 275; *Ex parte Sibbald* v. *United States*, 12 Pet. 488. The rule of these cases has been uniformly followed in later days; see, for example, *In re Washington & Georgetown R. Co.*, 140 U. S. 91; *Ex parte Union Steamboat Company*, 178 U. S. 317; *Kansas City Southern R. Co.* v. *Guaranty Trust Co.*, 281 U. S. 1. Chief Justice Marshall applied the rule to interdict allowance of interest not provided for in the mandate, *Himely* v. *Rose*, 5 Cranch 313; Mr. Justice Story explained and affirmed the doctrine, *The Santa Maria*, 10 Wheat. 431; *Boyce's Executors* v. *Grundy*, 9 Pet. 275. We do not see how it can be questioned at this time. It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendment of the mandate. But no move to do this was made during the term at which it went down. While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, *Hazel-Atlas Glass Co.* v. *Hartford Co.*, 322 U. S. 238, it has not been held to survive for the convenience of litigants. *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70.

The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. That it made no provision for interest was apparent on its face. Plaintiff accepted its advantages and brings her case to this Court, not on the proposition that amendment of the mandate has been improperly refused, but on the ground that the mandate should be disregarded. Such a position cannot be sustained. Hence the question whether interest might, on proper application, have been allowed, is not reached.[1] *In re Washington & Georgetown R. Co.*, 140 U. S. 91.[2]

Affirmed.

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[1] Compare *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847, with *Briggs* v. *Pennsylvania R. Co.*, 164 F. 2d 21.

[2] "We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so; but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term . . . with costs, and without interest. . . ." 140 U. S. 91 at 97.

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v.
The Pennsylvania Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 24, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy join, dissenting.

We granted certiorari to resolve a conflict between the decision of the Circuit Court of Appeals, 164 F. 2d 21, and one rendered by the like court for the Fifth Circuit in *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847.

In each case the jury returned a verdict for the plaintiff, but the trial court nevertheless gave judgment for the defendant as a matter of law;[1] upon appeal that judgment was reversed; and the cause was remanded with directions to enter judgment on the verdict. In both cases the appellate courts' mandates were silent concerning interest, but the trial courts included in the judgments interest from the date of the verdict, not merely from the time when judgment was entered following receipt

[1] In this case the complaint was dismissed on the ground that the plaintiff administratrix lacked capacity to bring the action; in the *Pratt* case the trial court found the verdict inconsistent with answers given to special interrogatories, and therefore gave judgment for the defendant.

of the appellate courts' mandates.[2] In the *Pratt* case this action of the trial court was sustained as conforming to the mandate; in this case the trial court's like action was reversed as being in excess of and, to that extent, contrary to the mandate.

The two cases thus present squarely conflicting decisions on two questions: (1) whether the appellate court's mandate includes the interest provided by 28 U. S. C. § 811,[3] although the mandate makes no explicit mention of interest; (2) whether, if so, the interest allowed by the section properly runs from the date of the verdict[4] or only from the time of entering judgment after receipt of the appellate court's mandate. Both questions are

[2] In the *Pratt* case the District Court allowed interest not only from the date of the verdict but also from the date of judicial demand. This was modified on appeal to allow interest only from the date of verdict. 142 F. 2d 847.

[3] The section is as follows: "Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State." Rev. Stat. § 966, 28 U. S. C. § 811.

[4] Although § 811 requires calculation of interest "from the date of the judgment," the claim is that, in circumstances like these, the words "the judgment" should be taken to specify not the time of entering judgment after appeal and issuance of mandate following reversal, but the time when judgment properly would have been entered but for the delay caused by the defendant's resistance to the plaintiff's rightful claim as established on appeal. Cf. Fed. Rules Civ. Proc., Rule 58. Petitioner fixes this time as the date of the verdict. It is not necessary now to consider whether, if petitioner's broad contention were accepted, the proper date would be that of the verdict or that on which the trial court concluded its consideration of the case and entered the original judgment for the defendant.

necessarily involved on petitioner's presentation and should now be decided.

This Court, however, declines to answer the second question, because it determines the first in respondent's favor, accepting, erroneously I think, the decision of the Circuit Court of Appeals in this phase of the case.[5] That court construed its mandate as not including interest. This was on the basis that the mandate was silent concerning interest, mentioning expressly only the principal sum awarded by the verdict. In such a case the court said, "the District Court is without power to enter judgment for a different sum."[6] Hence, it was held, the mandate was violated when interest was added to that sum. 164 F. 2d at 23. And even upon the assumption that the mandate might have been amended to include interest by timely application for that purpose, this could not be done after expiration of the term at which the judgment was rendered, as petitioner sought to have done.[7] *Ibid.*

It is this treatment of the court's mandate, now accepted by this Court and forming the basis for its disposition of the case without reaching the question certiorari was granted to review, from which I dissent. It confuses settled lines of distinction between different stat-

[5] The Circuit Court of Appeals not only rested upon its construction of its mandate and the view that it could not be altered after the term, but also decided the question concerning petitioner's right to interest under § 811 adversely to his claim that it begins to run prior to the date of the trial court's entry of judgment after remand. To what extent this ruling influenced the decision as to the mandate's effect is not clear.

[6] Citing *In re Washington & Georgetown R'd Co.*, 140 U. S. 91; *Thornton* v. *Carter*, 109 F. 2d 316. See text *infra* at note 11.

[7] In the *Pratt* case the term of court at which the original mandate of the Circuit Court of Appeals had been handed down had similarly expired.

utes and of decisions relating to them. I think these were correctly drawn and ought to be maintained. If that were done, we would be forced to reach and decide the question now avoided concerning the effect of § 811.

Ordinarily it is for the court issuing a mandate to determine its scope and effect, and other courts are bound by its determination. But this is not always so. If it were true, for example, that the silence of a mandate or a judgment regarding interest invariably precluded its recovery, the Court's decision and that of the Circuit Court of Appeals would be correct. But an explicit provision for interest is not always necessary to its inclusion, whether in a judgment or a mandate. In some instances interest attaches as a matter of law, even though the mandate or judgment is wholly silent regarding it. In others explicit mention is necessary to its inclusion. *Blair* v. *Durham*, 139 F. 2d 260, and authorities cited.

Where the claim for interest rests upon statute, whether the one or the other effect results depends upon the terms and effect of the particular statute on which the claim is founded. Because not all statutes are alike in this respect, the terms and intent of each must be examined, when put in question, to ascertain whether the interest allowed attaches to the judgment or the mandate by operation of law or only upon explicit judicial direction. Usually this is resolved by determining whether the interest allowed is to be given in the court's discretion or as a matter of right. *Blair* v. *Durham*, *supra*.

As the *Blair* opinion points out, ordinarily there is no occasion to mention statutory interest expressly, since it attaches as a legal incident from the statute allowing it.[8] On the other hand, it has often been declared that interest is not allowed on judgments affirmed by this Court or the Circuit Courts of Appeals unless so ordered expressly.[9]

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[8] *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689.

[9] See the cases cited in note 10.

The *Blair* opinion, however, further notes that all the cases so declaring are founded upon another statute than the one involved here, namely, 28 U. S. C. § 878.[10] And, it may be added, the decisions relied upon by this Court and by the Circuit Court of Appeals in this phase of the case presently before us involved either § 878 or the allowance of other relief not based on § 811.[11]

It becomes important therefore to ascertain whether the two statutes, §§ 811 and 878, are alike in their effects as requiring or not requiring explicit mention of the interest provided for in order for it to be included in a judgment or mandate. The two sections are very different in their terms. Section 878 authorizes the federal appellate courts to award damages for delay,[12] and in

[10] 139 F. 2d 260, 261. The authorities cited were *In re Washington & Georgetown R'd Co.*, 140 U. S. 91; *Boyce's Executors* v. *Grundy*, 9 Pet. 275; *De Witt* v. *United States*, 298 F. 182; *Green* v. *Chicago, S. & C. R. Co.*, 49 F. 907; *Hagerman* v. *Moran*, 75 F. 97.

[11] None of the cases on which this Court bases its decision involves § 811. They involve either § 878 [*Boyce's Executors* v. *Grundy*, 9 Pet. 275; *In re Washington & Georgetown R'd Co.*, 140 U. S. 91, which the majority emphasize by quotation]; the allowance of interest in the absence of statute as, *e. g.*, where goods are illegally seized and detained [*Himely* v. *Rose*, 5 Cranch 313; *The Santa Maria*, 10 Wheat. 431]; or the granting of relief, other than interest, beyond that decreed in the mandate [*Ex parte Sibbald* v. *United States*, 12 Pet. 488; *Ex parte The Union Steamboat Company*, 178 U. S. 317; *Kansas City So. Ry.* v. *Trust Co.*, 281 U. S. 1].

Of the cases cited by the Circuit Court of Appeals, see note 6, *In re Washington & Georgetown R'd Co., supra*, is a § 878 case, and *Thornton* v. *Carter*, 109 F. 2d 316, does not turn on § 811.

Thus, none of the authorities relied on govern the question presented here, *viz.*, whether under § 811 the mandate of the reviewing court excluded interest and was violated by its addition.

[12] The section is as follows: "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion." Rev. Stat. § 1010, 28 U. S. C. § 878.

terms makes the award discretionary with the reviewing court. *Schell* v. *Cochran*, 107 U. S. 625. It is in connection with such awards, as has been stated, that the repeated decisions now applied to petitioner's claim, grounded solely on § 811, have held that interest is to be deemed denied unless explicitly mentioned in the mandate.[13]

On the other hand, § 811 is very different. Nothing in its terms permits an implication that the award of interest is to be made as a matter of judicial discretion. The language is mandatory.[14] The section's obviously discriminating use of words, emphasized by comparison with that of § 878, gives the interest it encompasses as a matter of right. *United States* v. *Verdier*, 164 U. S. 213. This is so whether that interest begins to run as of one date or another. Whatever interest the section allows attaches as an incident flowing from the statute and is dependent in no way upon judicial discretion or upon judicial inadvertence in failing to mention it. This was the effect of the decisions in the *Pratt* and *Blair* cases, as well as *United States* v. *Verdier*, *supra*.

The Court's decision ignores these vital differences in the statutes, their terms and effects. Consequently it misapplies the decisions relating to § 878 and other situations where the relief sought was discretionary, to this claim arising only under § 811. The same thing happened in the Circuit Court of Appeals. However, the two sections differ so greatly in their terms, as bearing on whether the mandate's failure to mention interest excluded it, that there can be no justification for confusing or identifying them in this respect. The decisions con-

[13] See the authorities cited in note 10; see also note 11.

[14] "Interest *shall* be allowed on all judgments in civil causes, recovered in a district court, and *may* be levied . . ."; "it *shall* be calculated . . . ." (Emphasis added.) See note 3.

struing § 878 are neither controlling nor pertinent to that problem when it arises under § 811.

Petitioner's only claim is under the latter section. He seeks as of right interest given by § 811 and attaching to the judgment entered in his favor regardless of the mandate's omission to mention interest. This claim in my opinion is well grounded, to whatever extent § 811 allows interest. To that extent interest attaches and was meant to attach by operation of law, and regardless of the mandate's specificity, to the judgment rendered for the plaintiff. The extent to which the section gives interest is, of course, a distinct question, depending in this case on whether the section contemplates that the interest shall begin to run at one date or another.

Since the Court does not decide that question, I reserve decision upon it. But I dissent from the refusal to decide it now. The question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; [15] and the uncertainty as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredictable amount of injustice to litigants.

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[15] Cf. note 4. The matter is somewhat complicated by the anomaly which would result from a decision that, while § 878 provides for allowance of interest as damages for delay when a decision is affirmed, neither that section nor § 811 explicitly provides any such indemnity when a judgment for the defendant is reversed with directions to enter judgment for the plaintiff; and by the considerations, obviously relevant on the face of § 811, see note 3, relative to securing uniformity in the allowance of interest as between the federal courts and courts of the state in which the federal court sits. Cf. *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689; cf. also *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.